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MICHAEL RODAK, JR.

In the Supreme Court of the United States

October Term, 1972
No. 72-419

PITTSBURGH PRESS COMPANY,
Petitioner

v.

THE PITTSBURGH COMMISSION ON HUMAN RELATIONS AND THE CITY OF PITTSBURGH,
and
THE NATIONAL ORGANIZATION FOR WOMEN, INC.,
Respondents

On Writ of Certiorari to the Commonwealth Court of Pennsylvania.

BRIEF FOR AMICI CURIAE, PENNSYLVANIA COMMISSION ON THE STATUS OF WOMEN, PENNSYLVANIA HUMAN RELATIONS COMMISSION, COMMONWEALTH OF PENNSYLVANIA

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INDEX

	PAGE
Preliminary Statement	1
Statements of Interest of Amici Curiae	2
Statement of the Case	11
Summary of Argument	12
Argument:	
I. The Prohibition of Sex-Segregated Newspaper Advertisements Does Not Violate the First Amendment	15
A. The Column Headings of the Classified Help Wanted Advertisements Are Purely Commercial Speech Which Are Outside the Scope of the First Amendment Freedom of Expression	15
B. The Pittsburgh Human Relations Ordinance as Interpreted Below Is a Valid Regulation of Economic Activity Which Only Incidently Affects the Freedom of Expression	25
I. The Finding That Petitioner Aided Employers To Engage in Unlawful Employment Practices by Arranging Help-Wanted Advertisements Under Sex-Designated Column Headings Is Not Violative of Due Process of Law	34
Clusion	46

TABLE OF CITATIONS

CASES:

American Communications Association v. Douds, 339 U.S. 382 (1950) 31, 32

Associated Press v. NLRB, 301 U.S. 103 (1937) 25

Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) 18

Banzhaf v. FCC, 405 F. 2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969) 22

Branzburg v. Hayes, 408 U.S. 665 (1972) ... 25

Breard v. Alexandria, 341 U.S. 622 (1951) .. 18

Brown v. Board of Education, 347 U.S. 483 (1954) 45

Camp-of-the-Pine v. New York Times Co., 53 N.Y.S. 2d 475, 184 Misc. 389 (1945) .. 24

Capital Broadcasting Co. v. Kleindienst, 405 U.S. 1000 (1972) 22, 23

Capital Broadcasting Co. v. Mitchell, 333 F. Supp. 582 (D.D.C. 1971) 23, 30

Chaplinsky v. New Hampshire, 315 U.S. 568 (1941) 26

Cox v. New Hampshire, 312 U.S. 569 (1914) . 32

Dennis v. United States, 341 U.S. 494 (1951) . 27

Donaldson v. Read Magazine, 333 U.S. 178 (1947) 24

Ferguson v. Skurpa, 372 U.S. 725 (1963) .. 36

FTC v. Standard Educational Society, 302 U.S. 112 (1937) 24

Giant Foods, Inc. v. FTC, 116 U.S. App. D.C. 227, 322 F. 2d 977 (1963), cert. dismissed, 376 U.S. 967 (1964) 24

Ginzburg v. United States, 383 U.S. 463 (1966) 19, 20

Gray v. United States, 260 F. 2d 483 (D.C. Cir. 1958) 41

Greenfield v. Field Enterprises, 4 E.P.D. ¶7763 (N.D. Ill., 1972) 21

Hailes v. United Airlines, 464 F. 2d 1006 (5th Cir. 1972) 38, 39, 40

Head v. New Mexico Board of Examiners, 374 U.S. 424 (1963) 22

Holmgren v. Little Village Community Reporter, 342 F. Supp. 510 (N.D. Ill. 1971) .. 20

Kovacs v. Cooper, 336 U.S. 77 (1949) 32

Martin v. Struthers, 319 U.S. 141 (1943) ... 18

Meredith v. United States, 238 F. 2d 535 (4th Cir. 1956) 41

New York State Broadcasting Association v. United States, 414 F. 2d 990 (2nd Cir. 1969) 24

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 17, 18, 23

NLRB v. Virginia Electric and Power Co., 314 U.S. 469 (1941) 30, 31, 32, 33

Pennsylvania Human Relations Commission v. Chester School District, 427 Pa. 157, 233 A. 2d 290 (1967) 45

Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations, 4 Pa. Commonwealth Ct. 448, 287 A. 2d 161 (1972) .. 34, 42, 44

REA v. New York, 336 U.S. 106 (1949) ... 2
Reed v. Reed, 404 U.S. 71 (1971) 4
Schenck v. United States, 249 U.S. 47 (1919) . 2
SEC v. Texas Gulf Sulphur Co., 446 F. 2d 1301 (2nd Cir. 1971), cert. denied, 405 U.S. 1005 2
Smith v. California, 361 U.S. 147 (1959) ... 1
Tot v. United States, 319 U.S. 463 (1943) .. 4
United States v. A. B. Smythe Company, Inc. (No. 70-2236, N.D. Ohio, 1970) 2
United States v. Doughty, 460 F. 2d 1360 (7th Cir. 1972) 4
United States v. Dufur, 461 F. 2d 662 (10th Cir. 1972) 4
United States v. Hunter, 459 F. 2d 205 (4th Cir. 1972), cert. denied, 405 U.S. 931 (1972) 2
United States v. Provenzano, 334 F. 2d 678 (3rd Cir. 1964), cert. denied, 378 U.S. 947 4
Valentine v. Chrestensen, 316 U.S. 52 (1942) . 15, 16, 1
Von Patzoll v. United States, 163 F. 2d 216 (10th Cir.), cert. denied, 332 U.S. 809 (1947) 4

STATUTES:

Act Against Discrimination, Kan. Stat. Ann. §§44-1009 (c) (e) (1972) 2
Anti-Discrimination Act of 1965, Utah Code Ann. §§34-5-b (d) (e) (1953 Rep. Vol. 4, 1971 Supp.) 2

Civil Rights Act, Iowa Code Ann. §§601-A.7.1.C, 601.8.1. (1973 Supp.) 27
Civil Rights Act of 1964:
§2000 et seq. 21, 29
42 U.S.C. §2000(3)-3(f) 29
Civil Rights Act of 1968, 42 U.S.C. 3604(e) . 20
Fair Employment Practice Act, Conn. Gen. Stat. §§31-126(e) (f) (1961 Rev., 1969 Supp.) 27
Fair Employment Practice Act, Mass. Ann. Laws, Ch. 151B, §§4(3) (5) 27
Fair Employment Practice Act, Mich. Stat. Ann. §§17.4581(3a) (d) (1), 17.4581 (3) (g) (1968) 27
Fair Employment Pratices Act, Mo. Rev. Stat. §§296.020(3) (5) (1969) 27
Fair Employment Practice Act, Ore. Rev. Stat. §§659.030(3) (5) (1971) 28
Fair Employment Practices Act, R.I. Gen. Laws §§28-5-7(D) (4), (F) (1956, 1972 Supp.) 28
Fair Employment Practice Law, Hawaii Rev. Stat. §§378-2(3) (6) (1968) 27
Guidelines, Equal Employment Opportunity Commission 7
Guidelines on Discrimination Because of Sex, Pa. Bulletin No. 24, Vol. 1, p. 707, Dec. 19, 1970 ..... 9, 38
Human Relations Act, Pennsylvania:
43 P.S. §950, et seq. 8
955(b) (2) 9, 28, 29
955(e) 29
Human Rights Act, N.M. Stat. Ann. §§4-33-7-D, I(1) (1953, 1971 Supp.) 28

Human Rights Law, N.Y. §§296-1(d), 6 (McKinney, 1972) 28

Human Rights Law, N.Y. Admin. Code §§B1-7.0(1)(d), 7.0.(6) (1971) 28

Labor Management Relations Act of 1947, 51 Stat. 136, 29 U.S.C. §141, 159(h) 31

Law Against Discrimination, N.H. Rev. Stat. Ann. §§354-A:8 (III, VI), (1955, 1972 Supp.) 27

Law Against Discrimination, N.J. Stat. Ann. Tit. 10, Ch. 5. §§12(c)(e) (1972 Supp.) 28

Law Against Discrimination, Wash. Rev. Code §49.60.180(4), §49.60.220 (1972 Supp.) 28

National Labor Relations Act, §9a 31

Pittsburgh Human Relations Ordinance, No. 75, as amended by Ordinance No. 395:

§4B 35

§8(a) 36, 43

§8(e) 9, 34, 35, 41, 43

§8(j) 10, 19, 30, 34, 37, 41, 42, 43

State Act Against Discrimination, Minn. Stat. §§363.03(1)(4)(b), (1)(6)(2) (1971) 27

AUTHORITIES:

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Meiklejohn, The Freedom of Expression Is an Absolute, 1961 Supreme Court Review 245 33

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rules 42(2) and 42 (4), written consent of all parties having been filed with this Court, the Pennsylvania Commission on the Status of Women, the Pennsylvania Human Relations Commission and the Commonwealth of Pennsylvania, by its Attorney General, file this brief as amici curiae urging that the January 27, 1972 Order and Decision of the Commonwealth Court of Pennsylvania be affirmed.

PENNSYLVANIA COMMISSION ON THE STATUS OF WOMEN

STATEMENT OF INTEREST FOR AMICUS BRIEF

The Pennsylvania Commission on the Status of Women was established by Executive Order of the Governor on April 11, 1972 "to make certain that women have full opportunity to serve in every capacity as citizens of the Commonwealth, as equal participants in the economy, in politics and government, in social development, in the system of justice, and in all facets of life."

Further, the Commission was charged by the Governor with the responsibility of developing:

> "* * * all programs necessary to implement Article I, Section 27 of the State Constitution (the Equal Rights Amendment):
>
> " 'Equality of Rights under the law shall not be denied or abridged in the Commonwealth of Pennsylvania because of the sex of the individual.' "

Our mandate charges us with the responsibility of initiating action and acting as strong advocates for the rights of women to insure that this purpose is carried out.

Women today are not equal participants in the economy, and one of the contributing factors respon-

sible for existing inequities in employment is sex-segregated help-wanted job advertising in newpapers. Women comprise 52 percent of the population of Pennsylvania according to the 1970 census. And they make up thirty-six and one-half percent of the Pennsylvania work force—or over one and three-quarter million members of that work force. Seventy percent of these women employed outside the home work out of economic necessity. They are either single, widowed, divorced, separated or their husbands earn less than $7,000 per year. And here it is significant to note that the United States Government has stated that a family of four needs $6,567 to subsist at a low standard of living.[1] Yet, because of discriminatory employment practices, Labor Department statitstics reveal that three-quarters of women workers are clustered in the lower-paying, less-rewarding service and clerical jobs.

Such employment discrimination does not only affect the individual woman involved. In forty percent of our family units today, both the husband and wife work full-time. Thirteen million mothers are in the labor force, of whom half have school-age children and one-third have children under the age of three. Denying these women access to equal employment opportunity and equal pay consigns not only themselves, but their families as well to suffer the added burden of financial deprivation, with all of its attendant consequences in terms of housing, health care, educational opportunity and the amenities of life.

[1] The Federal Women's Program, A Point of View, United States Civil Service Commission, 1972, p. [illegible]

And the deprivation is even more significant for those women who are heads of households. Although families headed by a woman constituted only eleven percent of all families in 1970, they accounted for thirty-seven percent of all poor families. The proportion of all poor minority families that were headed by a woman was even greater—fifty-seven percent.[2]

The consequences to society in terms of economic loss and the added burden of social welfare programs is enormous. The loss of undeveloped and thwarted human potential can hardly be measured. A study by Dr. Sandra Bem and Dr. Daryl Bem indicates that seventy-eight percent of all working women are currently employed in jobs which would be advertised in female help-wanted columns, and that less than one percent of the rest are in positions such as physician, judge, college president or professor, which would not be advertised in the newspaper.[3] And, as is pointed out in *The Hastings Law Journal* of November, 1971, "most of the better jobs for which women could qualify are reached by help-wanted columns, including the lower level jobs forced on most women."[4]

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[2] Fact Sheet on the American Family in Poverty, U. S. Department of Labor, Women's Bureau, 1971.

[3] Bem & Bem, Sex-Segregated Want Ads: Do They Discourage Female Job Applicants? In Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Educ. of the Comm. on Educ. and Labor, 91st Congress, 2nd Sess., Pt. 2, at 891, 1970.

[4] Elizabeth Boyer, Help Wanted Advertising—Everywoman's Barrier, The Hastings Law Journal, Volume 23, No. 1, November 1971.

The sex classification of jobs in newspapers, therefore, has a direct effect on the number of jobs available to the vast majority of working women. The effects are not restricted to quantitative limitations on employment opportunity. There is also a direct effect on the quality of the jobs available to women. Dr. Gerald H. F. Gardner's testimony before the office of Federal Contract Compliance on August 6, 1969,[5] documented the disparity between the quality of jobs offered under the "male" and "female" headings. The higher-paid jobs, those which carry with them career possibilities, appear in the male columns; the lower-paid, non-career jobs appear in the female columns. Historically, jobs that are demonstrably the same, such as Administrative Assistant and Executive Secretary, are advertised under headings which offer the dead-end, lower-paying secretarial job to women and the comparable position, labeled Administrative Assistant, with a built-in career ladder, to men.

Thus, the talents of well-qualified women are wasted because they are forced into jobs for which they are over-qualified with little chance for advancement, and their value is depressed in the job market, resulting in a loss to the economy as well as to the individual worker. Based on United States Labor Department statistics, as cited in the President's Economic Report to Congress of February, 1973, the average woman today earns approximately two-thirds of what similarly qualified men earn, a condition

[5] Testimony of Dr. Gerald H. F. Gardner, before the Office of Federal Contract Compliance, August 6, 1969.

which has not improved since 1956. The continued advertising of job classifications according to sex is a major factor in this discrimination. The average married woman today will work twenty-five years. A single woman will work forty-five years, two years longer than the average work span for men. On the basis of an income of $100 per week, the economic loss over a span of forty-five years to a woman earning only two-thirds the salary of a man is over $75,000, and that does not take into consideration the additional loss from lack of advancement opportunity resulting from being locked into a dead-end job.

Moreover, the loss does not stop at employment opportunity and equal pay during working years. Such discrimination has a cumulative effect, for upon retirement a woman will receive lower social security and pension benefits if her salary, upon which those benefits are based, was less than that earned by a man doing comparable work. Women, therefore, are consigned to even further economic deprivation in their retirement years. This discrimination is compounded by the fact that women live seven years longer on the average than men. In Pennsylvania alone, approximately 200,000 women over sixty-five are living in poverty.

Since its creation, the Pennsylvania Commission on the Status of Women has had as a prime concern the entire area of employment from recruitment to retirement. We have found that all forms of communications which offer job opportunities play a critical role not only in the recruitment and selection of women, but in the opportunity they have for career

development. Yet the distribution of women in the labor force continues to show an unfortunate pattern of relegating women to so-called feminine jobs.

The Equal Employment Opportunity Commission has recognized the discriminatory effects of sex-segregated help-wanted advertising and promulgated the following guideline:

> "It is a violation of Title VII (of the Civil Rights Act) for a help-wanted advertisement to indicate a preference, limitation, specification or discrimination based on sex unless sex is a bona fide occupational qualification for the particular job involved. The placement of advertisements in columns . . . headed 'male' or 'female' will be considered an expression of preference, limitation, specification or discrimination based on sex."

In order to carry out its purpose "to make certain that women have full opportunity to serve in every capacity as citizens of the Commonwealth, as equal participants in the economy . . . and to be a strong advocate for the rights of women in all areas of the Commonwealth . . .", the Pennsylvania Commission on the Status of Women supports strict adherence to the EEOC Guidelines and urges immediate cessation of sex-segregated help-wanted advertising.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

STATEMENT OF INTEREST FOR AMICUS BRIEF

The Pennsylvania Human Relations Act was created by the legislature of the Commonwealth of Pennsylvania (Act of October 27, 1955, P. L. 744, as amended, 43 P.S. §950 *et seq.*) as an exercise of the Commonwealth's police power to protect the public welfare, prosperity, health and peace of its citizens. Established to enforce the Human Relations Act, the Pennsylvania Human Relations Commission was specifically charged with the protection of the civil rights set forth in the Act and with the implementation of the public policy of the Commonwealth, as follows:

> "It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestery, age, sex or national origin, and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights at places of public accommodation and to secure commercial housing regardless of race, color, religious creed, ancestry, sex, use of guide dogs because of blindness of the user or national origin."

Amendments to the Human Relations Act by the Act of July 9, 1969, P. L. 133, provided the Commission with a firm mandate from the legislature to seek out and eliminate all unlawful discriminatory practices based upon sex in the areas of employment and housing. Pursuant to this mandate, the Commission promulgated its "Guidelines on Discrimination Because of Sex", Pa. Bulletin No. 24, Vol. 1, p. 707, Dec. 19, 1970, the relevant provisions of which are set forth more fully *infra*. Section 2 of these Guidelines specifically construes Section 5(b) (2) of the Human Relations Act and sets forth that the placement of a classified employment advertisement in a publication under sex-designated column headings is construed by the Commission to be a violation of Section 5(b) (2). That Section of the Act provides as follows:

> "It shall be an unlawful discriminatory practice . . .
>
> (b) For any employer, employment agency or labor organization, prior to the employment or admission to membership, to . . .
>
> (2) Print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination based upon . . . sex."

The language of this section is substantially similar to that contained in Section 8(e) of the Pittsburgh Ordinance under review in this case. In addition, Section 5(c) of the Pennsylvania Act contains

provisions that are identical to those contained in Section 8(j) of the Pittsburgh Ordinance here under review which prohibit any person from aiding in the doing of any act declared to be an unlawful discriminatory practice by the Act.

The Pennsylvania Human Relations Commission presently has upon its docket a number of cases against major newspapers throughout the Commonwealth which raise issues identical to those before this Court on the present appeal. In addition, informal complaints have been received against other newspapermen in Pennsylvania alleging that their use of gender interest help-wanted advertising unlawfully aids employers and employment agencies in the violation of the Human Relations Act. Action upon all of these cases has been deferred by the Commission pending the outcome of the Pittsburgh Press case before this Court. The interest of this amicus, therefore, in the outcome of this appeal is critical, for the decision of this Court will provide the Pennsylvania Human Relations Commission with a definitive interpretation of the law which it seeks to enforce in this area.

STATEMENT OF THE CASE

The *Amici*, the Commission on the Status of Women, Pennsylvania Human Relations Commission, and the Pennsylvania Department of Justice, adopt the statement of the case as set forth by Respondent, Pittsburgh Commission on Human Relations in its brief submitted to this Honorable Court.

SUMMARY OF ARGUMENT

I.

A newspaper's placement of help-wanted advertisements in sex-segregated columns is pure commercial communication which is outside the scope of the First Amendment protection of freedom of expression. The decisions of this Honorable Court have long sustained statutes and ordinances regulating commercial communication. This Court has always balanced the commercial and non-commercial aspects of each communication to determine whether it was worthy of First Amendment protection. In striking this balance, the Court has emphasized the functional distinctions between unprotected commercial expression and protected idea or opinion-oriented expression. The sex-designated column headings are clearly pure commercial communication which is unworthy of First Amendment protection.

It has long been held by this Court that neutral economic regulations which have only an incidental effect on the freedom of expression do not violate the First Amendment. The doctrinal basis for this principle is that state and local governments may constitutionally impose limitations on the freedom of expression of the limitation is a regulation of a substantial evil pursuant to a lawful exercise of the police power. Federal, state, and local governments have all recognized the deleterious effect of denying equal access to employment opportunities to women.

This Court has sustained statutory regulation of the employer-employee relationship even when it impinged on the fundament public communication of political ideas. It follows, *a fortiori*, that the Pittsburgh Ordinance, which merely regulates commercial speech, is constitutional.

II.

An abundance of testimony and documentary evidence exists upon the record to support the finding by the Pittsburgh Commission that the Pittsburgh Press aided employers to engage in discriminatory employment practices through its use of sex-designated column headings in its employment advertising. The Commission found that numerous employers violated Section 8(e) of the Pittsburgh Ordinance by causing to be published employment advertisements that indicated discrimination because of sex. It was further found that the Pittsburgh Press aided in these violations of Section 8(e) by using sex-designated column headings in its help-wanted advertising and, therefore, was itself in violation of Section 8(j) of the Ordinance. Under the law of aiding and abetting these findings alone were sufficient to support a conclusion that the Pittsburgh Press aided in violations of the Pittsburgh Ordinance.

Finally, testimony by Petitioner's classified advertising manager unequivocally established both that advertisers intended to express a preference for applicants of a particular sex and that Petitioner was aware of this fact and aided those advertisers to indicate such preferences in its publication. Considera-

tion of the aforementioned factors compels the conclusion that the finding by the Pittsburgh Commission on Human Relations was not violative of due process of law.

ARGUMENT

I. THE PROHIBITION OF SEX-SEGREGATED NEWSPAPER ADVERTISEMENTS DOES NOT VIOLATE THE FIRST AMENDMENT

A. The Column Headings of the Classified Help Wanted Advertisements Are Purely Commercial Speech Which Are Outside the Scope of the First Amendment Freedom of Expression

Valentine v. Chrestensen, 316 U.S. 52 (1942), is the seminal case analyzing the nexus between the First Amendment guarantee of freedom of expression and commercial expression. In *Chrestensen* this Court sustained the constitutionality of an ordinance restricting the distribution of commercial handbills stating that:

> "We are equally clear that the Constitution imposes no such restraint [on limitations of free speech] on purely commercial advertising." 316 U.S. at 54.

In *Chrestensen*, as in the instant case, the commercial communication is juxtaposed with allegedly protected speech. In *Chrestensen*, in order to avoid a city ordinance which restricted the circulation of commercial handbills, the defendant printed a protest on the back of handbills. The Court concluded

that since the protest had been added with the intent and for the purpose of evading the prohibition of the ordinance, it was not communication worthy of First Amendment protection. This Court should reach the same result in the instant case. Clearly the Pittsburgh Commission on Human Relations can prohibit the statement of sexual preference in the body of a classified help-wanted advertisement. This Court should not allow a newspaper to achieve the same discriminatory effect by placing advertisements in columns with sex-preference headings claiming protection for these headings under the First Amendment. To reverse the decision of the court below would be to allow the Pittsburgh Press to do by indirection that which it cannot do directly. In addition, it would also reject the *Chrestensen* doctrine that purely commercial advertising may be regulated.

Since *Chrestensen* was decided, the key to subsequent cases discussing the First Amendment and advertising has been the determination of whether the disputed forms of expression were primarily commercial or noncommercial. Professor Emerson has defined the commercial sector as:

> "The production and exchange of goods and services for profit, as distinct from the production or exchange of ideas on political, religious, artistic, and similar matters." Emerson, *The Freedom of Expression*, 414 (1970).

This definition provides an excellent framework within which to analyze the decisions of the Court delineating the distinctions between protected First Amendment expression and commercial or business

expression. It emphasizes functional distinctions between unprotected commercial expression and protected idea or opinion-oriented expression instead of formalistic incantations like "editorial policy", "controversial subject", and "public convenience".

The Court has always balanced the commercial and noncommercial aspects of a given communication to determine whether it was worthy of First Amendment protection. This Court emphatically made this point when it rejected respondent's argument in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964), that the allegedly libelous statements were not entitled to any First Amendment protection because they appeared in a paid advertisement. In *Sullivan*, the Court reviewed a libel judgment which had been entered against the New York Times as a result of a full page advertisement which appeared in the Times allegedly criticizing certain officials of Birmingham, Alabama, and supporting the civil rights work of the late Dr. Martin Luther King. The Court rejected the attempt of respondents to equate the word "commercial" with the word "paid". 376 U.S. at 265. The obvious meaning of this analysis is that when the *Chrestensen* court used the word "commercial" it meant the production and exchange of goods and services for profit, not the payment of money to procure the publication of a particular communication. Thus, the Court rejected the idea that the *form* of a communication determines whether it is worthy of First Amendment protection and adopted a balancing test. It balanced the effect the communication would have on the exchange of goods and services in the market place against the effect it

would have on the exchange of information in the market place of ideas. Communication is afforded First Amendment protection whenever its primary focus is the market place of ideas without regard for the context in which it appears. cf. *Smith v. California*, 361 U.S. 147, 150 (1959); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963). This Court has clearly articulated its reason for refusing to consider form over substance. It said: "Any other conclusion would discourage newspapers from carrying 'editorial advertisements' of this type, and so might shut off an important outlet for the promulgation of information and ideas . . ." 376 U.S. at 266.

This Court resolved a similar problem in *Breard v. Alexandria*, 341 U.S. 622 (1951). In that case the Court sustained the constitutionality of a "Green River" ordinance prohibiting door-to-door solicitations for the sale of goods without the prior consent of the householder. Petitioners, magazine publishers, argued that the enforcement of this ordinance against people selling magazine subscriptions was a violation of the First Amendment. The Court balanced the fact that the First Amendment activity of magazine publishing was partially financed by door-to-door subscription solicitations against the purely commercial profit motive in the solicitation of magazine subscriptions. After distinguishing the ordinance from a broader ordinance precluding all solicitations, cf. *Martin v. Struthers*, 319 U.S. 141 (1943), the Court concluded that the Alexandria ordinance was sufficiently narrow to be construed as a commercial regulation rather than a burden upon publishers who

were seeking funds to finance the dissemination of ideas, and as such it was not in violation of the First Amendment.

Ginzburg v. United States, 383 U.S. 463 (1966), is another case in which this Court has resolved a significant First Amendment issue by considering the substance of the written material in the context in which it appeared rather than the mere form of the publication out of context. In *Ginzburg*, this Court refused to consider the content of *Eros* and the companion publications separately from the advertising which proceeded or accompanied them. The Court assumed that the prosecution could not have succeeded on the basis of the content of the publications alone, but sustained the conviction because it was proper to consider the content in the context in which it appeared. 383 U.S. at 465. Ginzburg's publications appeared accompanied by advertising which made it clear that their purpose was to pander to the prurient interests of the readers.

Similarly, the purpose of sex-designated help-wanted advertising columns is clear. It is to encourage the continuation of illegal sex-stereotyping in the employment market. The decisions of this Court provide a sound rationale for sustaining the constitutionality of Section 8(j) of the Pittsburgh Human Relations Ordinance. Ordinance No. 75, February 27, 1967, as amended by Ordinance No. 345, July 8, 1969. This Court clearly articulated this rationale when it said:

"Material sold solely to produce sexual arousal, like commercial advertising, does not

escape regulation because it has been dressed up as speech, or in other contexts might be recognized as speech." *Ginzburg*, supra, at 474 n.17.

Nevertheless, the Pittsburgh Press insists that the placement of help-wanted advertisements in sex-designated columns is an editorial decision worthy of protection of the First Amendment. This claim unsupported by authority demeans the great tradition of First Amendment freedom which this court has long upheld. Although this is the first case raising the specific factual issue of whether classified column headings are commercial speech outside the scope of the First Amendment, federal courts have recently reaffirmed the doctrine that purely commercial advertising is not protected by the First Amendment in cases involving the regulation of classified advertising to effectuate the enforcement of federal civil rights acts.

The Court of Appeals in *United States v. Hunter*, 459 F. 2d 205 (4th Cir. 1972), cert. denied, 405 U.S. 931 (1972), sustained the constitutionality of Section 804(e) of the Civil Rights Act of 1968; 42 U.S.C. §3604(e). That section prohibits the printing of discriminatory classified advertisements for the sale or rental of residential dwellings. In so holding the Court of Appeals correctly asserted that it was following an unbroken line of Supreme Court authority. 459 F. 2d at 211.[1]

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[1] Two United States District Courts have also sustained the constitutionality of 42 U.S.C. 3604(e): *Holmgren v. Little Village Community*, Reporter 342 F. Supp. 510 (N.D. Ill. 1971); *United States v. A. B. Smythe Company, Inc.* (No. 70-2236, N.D. Ohio, 1970).

Similarly, in *Greenfield v. Field Enterprises*, 4 E.P.D. §7763 (N.D. Ill., 1972), the court held that newspapers were not covered by §704(6) of the Civil Rights Act of 1964, 42 U.S.C. §2000(e)-3(b), as a matter of statutory construction. However, it went on to dismiss as without basis the First Amendment issue raised by the defendant Chicago Tribune. Thus, the District Court indicated that a federal regulation of classified employment advertisement would not violate the First Amendment if it were drafted so as to regulate newspaper advertising.

The Pittsburgh Commission on Human Relations, the Court of Common Pleas of Allegheny County, and the Commonwealth Court of Pennsylvania have made the same factual determination in this case that is implicit in all of the cases discussed supra. Indeed, the Court of Common Pleas said: "It is difficult to think of a more commercial aspect of the newspaper than captions to the classified advertisements section" (R. 43a.) Thus, the courts below have determined that the column heading above the help-wanted classified advertisements in the Pittsburgh Press are pure commercial communication associated with the production and exchange of goods and services for profit rather than noncommercial speech associated with the production and exchange of information in the marketplace of ideas.

The recent cases sustaining strict Federal Communications Commission regulation of cigarette advertising demonstrate that the Pittsburgh Commission on Human Relations and the Pennsylvania courts struck the appropriate balance when they each de-

termined that column headings for classified help-wanted advertisements were pure commercial communication subject to strict regulation rather than protected noncommercial communication. In *Banzhaf v. FCC*, 405 F. 2d 1082 (D.C. Cir. 1968), cert. denied, 396 U.S. 842 (1969), the Court of Appeals sustained an FCC ruling that stations and channels which broadcast cigarette advertisements were required to provide substantial amounts of time for anti-smoking commercials. It rejected the First Amendment argument saying, "many cases indicate that product advertising is *at least* less vigorously protected than other forms of speech". (emphasis added) *Banzhaf*, supra, at 1101. The Court noted the relevance of *Head v. New Mexico Board of Examiners*, 374 U.S. 424 (1963), a case which sustained state regulation of price advertising by optometrists without discussing the First Amendment issue and reasoned that such regulations do not raise Constitutional problems because the regulated communications do not affect the political process, contribute to the exchange of ideas, provide information on matters of public importance or limit a form of individual self-expression, *Banzhaf*, supra, at 1101. Thus, the Court of Appeals recognized that the commercial purpose of product market oriented advertising so outweighs any informational value inherent in the advertising that it need not be afforded the protection of the First Amendment.

Moreover, this Court has affirmed the holding of a three judge court that the FCC may constitutionally ban all cigarette advertising in the electronic telecommunications media. *Capital Broadcasting Co. v.*

Kleindienst, 405 U.S. 1000 (1972), aff'g. *Capital Broadcasting Company v. Mitchell*, 333 F. Supp. 582 (D.D.C. 1971). In explaining its holding, the District Court effectively deals with the objection raised by the Pittsburgh Press that the order of the Human Relations Commission circumscribed the Press's ability to engage in social commentary. It said:

> "Thus, contrary to the assertion made by petitioners, Section 6 does not prohibit them from disseminating information about cigarettes, and therefore, does not conflict with the exercise of their first Amendment rights." At 584.

The situation in this case is identical to that in the long line of cases discussed above. In each of these cases the legislative body or administrative agency has attempted to regulate an activity which had some of the aspects of protected First Amendment freedom of expression and some of the aspects of unprotected commercial communication. In each case, the Court balanced the competing claims to determine whether the communication more nearly resembled protected communication of ideas or the mere exchange of information pursuant to the production and exchange of goods and services for profit. In all of these decisions, including *New York Times v. Sullivan*, supra, the Court refused to be bound by the labels which can so easily be placed on modes of communication or methods of conduct. Rather the court made a basic factual determination as to the nature of the activity which was to be regulated. In all of those cases, the Court recognized that what was being regulated was not the free expression of ideas,

but the manner in which people and corporations sold products to make profit. The Pittsburgh Commission on Human Relations and the Courts below have made the requisite factual determination that column headings in help-wanted classified advertising are commercial communication rather than the free expression of ideas. Therefore, the ordinance of the City of Pittsburgh prohibiting a newspaper from arranging help-wanted advertisements under columns labeled "Jobs—Male Interest", "Jobs—Female Interest", and "Jobs—Male—Female" does not violate the First Amendment of the United States Constitution because column headings are not expression protected by the First Amendment.[2]

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[2] To hold otherwise would by implication invalidate innumerable other regulations of advertising which have been repeatedly sustained by Courts against all manner of challenges. Cf. *N.Y. State Broadcasting Association v. U. S.*, 414 F. 2d 990 (2d Cir. 1969); *FTC v. Standard Educational Society*, 302 U.S. 112 (1937); *Giant Foods, Inc. v. FTC*, 116 U.S. App. D.C. 227, 322 F. 2d 977 (1963), *cert. dismissed* 376 U.S. 967 (1964); *Camp-of-the-Pine v. NYT Co.*, 53 N.Y.S. 2d 475 184, Misc. 389 (1945); *Donaldson v. Read Magazine*, 333 U.S. 178 (1947); *REA v. New York*, 336 U.S. 106 (1949); *SEC v. Texas Gulf Sulphur Co.*, 446 F. 2d 1301 (2nd Cir. 1971), *cert. denied* 404 U.S. 1005.

1. The Pittsburgh Human Relations Ordinance as Interpreted Below Is a Valid Regulation of Economic Activity Which Only Incidentally Affects the Freedom of Expression and Does Not Violate the First Amendment

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), a case holding that the First Amendment does not relieve newspaper reporters of the obligation to respond to a grand jury subpoena and answer relevant questions, this Court has reaffirmed the doctrine that otherwise valid statutes of general applicability are not invalid because they indirectly affect the press. The Court said:

> "It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that '[t]he publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and properties of others.'" *Associated Press v. NLRB*, 301 U.S. 103, 132-133, 57 S. Ct. 650-656, 81 L. Ed. 953 (1937), 408 U.S. at 682, 683.

Branzburg, supra, was the most recent of a long line of cases in which the Court has defined the lim-

ited area in which regulation of otherwise protected speech is permitted. This area can be defined as the regulation of conduct which is the inevitable consequence of protected speech or expression. The placement of help-wanted advertisements in sex-designated columns is conduct which may constitutionally be regulated. It is an activity which is more likely to produce illegal discriminatory conduct than to facilitate the free exchange of ideas.

In *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1941), the Court sustained as constitutional a narrowly drawn and strictly construed breach of peace statute even though it had been used to punish strictly verbal conduct. The Court explained that such a statute punishing conduct seemingly within the ambit of the First Amendment's protections was not invalid because the public interest in order clearly outweighed any value the statements might have as a step toward truth. 315 U.S. 568 (1941).

This is the same doctrine that had been announced by Mr. Justice Holmes in *Schenck v. U. S.*, 249 U.S. 47 (1919). The *Schenck* opinion is instructive because the substantive evil therein was not the violent overthrow of the government or some other act of violence, but rather opposition to conscription during World War I. In that case, the Court recognized that even certain kinds of written handbills containing clearly political ideas would not be protected by the First Amendment if their immediate effect would be to produce action in violation of a validly-enacted statute. Thus, speech or writing may only be constitutionally regulated if it is so closely connected

with illegal action that the two cannot be separated. When speech is thus regulated, the regulation is a limitation on the freedom of expression. The limitation is justified because the Court must balance important competing social values and choose one. This need to balance competing values was most clearly articulated when this Court modified the "Clear and Present Danger" test and accepted Judge Learned Hand's explicit recognition of the need to balance:

> "In each case . . . [courts] must ask whether the gravity of the 'evil', discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." *Dennis v. United States*, 341 U.S. 494, 510 (1951) quoting from 183 F. 2d 201, 212 (2d Cir. 1950).

The answer to that question in this case is clear. State legislatures, the United States Congress and municipal governments have all recognized the evils of employment discrimination.[8] Indeed, the prin-

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[8] Cf. Conn. Fair Employment Practice Act, Conn. Gen. Stat. §§31-126(e) (f) (1961 Rev., 1969 Supp.); Hawaii Fair Employment Practice Law, Hawaii Rev. Stat. §§378-2 (3) (6) (1968); Iowa, Civil Rights Act, Iowa Code Ann. §§601A.7.1.C, 601.8.1 (1973 Supp.). Kansas Act Against Discrimination, Kan. Stat. Ann. §§44-1009(c) (e) (1972); Mass. Fair Employment Practice Act, Mass. Ann. Laws Ch. 151B, §§4(3) (5); Mich. Fair Employment Practice Act, Mich. Stat. Ann. §§17.4581(3a)(d)(1), 17.4581(3)(g)(1968); Minn. State Act Against Discrimination, Minn. Stat. §§363.-03(1)(4(b) (1)(6)(2) (1971). Mo. Fair Employment Practices Act, Mo. Rev. Stat. §§296.020(3) (5) (1969); N. H. Law Against Discrimination, N. H. Rev. Stat. Ann. §§354-

ciple that employment discrimination is a violation of the Fourteenth Amendment is so well established that it needs no citation.

At the hearing of the Pittsburgh Commission on Human Relations on January 15, 1970, and February 26, 1970, Dr. Sandra Bem convincingly demonstrated that even where there is a plainly printed disclaimer the inevitable effect of sex-designated column headings in classified help-wanted advertisements was to discourage women from applying for jobs which appeared in the columns designated "Jobs—Male Interest" (R. 64a-88a, 225a-261a). Since the vast majority of jobs, especially the high-paying jobs, appeared in the columns headed "Jobs—Male Interest" (R. 301a, 303a, 355a), the inevitable effect of sex-segregated help-wanted advertising is to deny women equal access to all available jobs.

In its brief, the Pittsburgh Press makes much of the fact that it does not intend to foster unlawful

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A:8 (III, VI) (1955, 1972 Supp.); N. J. Law Against Discrimination, N. J. Stat. Ann. Tit. 10, Ch. 5, §§12(c) (e) (1972 Supp.); N. M. Human Rights Act, N. M. Stat. Ann. §§4-33-7-D, I(1) (1953, 1971 Supp.); N .Y. Human Rights Law, §§296-1(d), 6 (McKinney, 1972); Ore. Fair Employment Practice Act, Ore. Rev. Stat. §§659.030(3)(5) (1971); Pa. Human Relations Act, Pa. Stat. Ann. Tit. 28, §§955 (b)(2) (e) (1964, 1972 Cum. Supp.); R. I. Fair Employment Practices Act, R. I. Gen. Laws, §§28-5-7(D)(4) (f) (1956, 1972 Supp.); Utah Anti-Discrimination Act of 1965, Utah Code Ann. §§§34-5-b(d) (e) (1953 Rep. Vol. 5, 1971 Supp.); Wash. Law Against Discrimination, Wash. Rev. Code, §49.60.180(4), §49.60.220 (1972 Supp.); N. Y. City Human Rights Law, N. Y. City Admin. Code, §§B1-7.0(1) (d) 7.0(6) (1971).

discrimination. This argument misstates the crucial issue. The issue is not whether the Pittsburgh Press intended to foster employment discrimination but whether the Press intended to foster any differential treatment of men and women which is an unfair employment practice in violation of Section 8 of the Pittsburgh Human Relations Ordinance. In petitioner's brief, they admit that the purpose of the sex-designated column headings was to highlight the jobs which are more suitable for members for a particular sex. This admission is an admission of an intent to treat men and women differently which is a violation of the ordinance. Moreover, Mr. Robert Seli, the classified advertising manager of the Pittsburgh Press, testified that whenever necessary ad-takers inquired as to where an employer wanted an advertisement to appear because most jobs were male or female oriented jobs and placing the advertisement in the appropriate column was necessary to satisfy the Press's customers (R. 128a, 170a-173a). This testimony further establishes the requisite intent to foster the differential treatment of men and women in the employment market which is an unfair employment practice.

Sex-segregated help-wanted advertising clearly perpetuates a substantial evil which the City of Pittsburgh, the Commonwealth of Pennsylvania, and the United States have recognized and sought to eliminate. Cf. Pennsylvania Human Relations Act, Act of July 9, 1969, P. L. 133, 43 P.S. 955; Title VII, Civil Rights Act of 1964, 42 U.S.C. §2000 et seq. This evil is employment discrimination which confines women to traditional "women's jobs" and denies them access

to higher paying jobs which have previously been available only to men. It will continue to exist and indeed may grow more serious unless newspapers are required to refrain from publishing sex-segregated help-wanted advertisements. Therefore, this Court should not hesitate to sustain the constitutionality of the order of the Pittsburgh Commission on Human Relations. The restrictions on freedom of expression inherent in this form of regulation is *de minimis* because Section 8(j) of the Pittsburgh Human Relations Ordinance, does not prevent the Pittsburgh Press from publishing articles and editorials expressing any and every conceivable point of view on the issue of employment discrimination and the role of women in the society. Cf. *Capital Broadcasting*, supra, at 584.

In two cases analyzing the powers and duties of the National Labor Relations Board, this Court has rejected First Amendment challenges to the National Labor Relations Act. These cases are significant because they show that the regulation of the employer-employee relationship is so important that it justifies limitations upon the freedom of expression and because the expression and communication which are regulated in these cases is the exchange of political ideas.

This court has held that an employer may express any view on unionism he wanted so long as he does not do so as part of a coercive course of conduct. *NLRB v. Virginia Electric & Power Co.*, 314 U.S. 469 (1941). In so holding the Court recognized that in certain circumstances an employer's speech may be

so closely related to an illegal course of conduct as to be verbal acts more like conduct than protected communication. Thus, in *Virginia Electric & Power Co.*, this Court said the statutory right of organization was so important and at the same time so frail that speech which in most contexts would be protected, could as part of a coercive course of conduct, be prohibited by the NLRB. Like the right of laborers to organize and bargain collectively shortly after the enactment of the National Labor Relations Act, the right of women to be equal participants in the economic life of the country a few short years after the enactment of Title VII of the Civil Rights Act of 1964 is in practice a frail one. Therefore, when a major metropolitan newspaper chooses to continue a policy of sex-segregated help-wanted advertisements, the practice must be prohibited to further the important statutory goal of guaranteeing full equality of economic opportunity for all.

Similarly, in *American Communications Association v. Douds*, 339 U.S. 382 (1950), this Court sustained the constitutionality of Section 9(a) of the National Labor Relations Act, as amended by the Labor Management Relations Act of 1947, 51 Stat. 136, 146; 29 U.S.C. §§141, 159(h), which required union officers to take a noncommunist oath before they could have access to the NLRB's enforcement mechanisms. The Court reasoned that the Section did not abridge the freedom of association inherent in the First Amendment because Congress intended to regulate harmful conduct, the political strike, rather than political affiliations or beliefs. In so holding, the Court said:

". . . the right of the public to be protected from the evils of conduct, even though First Amendment rights of persons or groups are thereby in some manner infringed, has received frequent and constant recognition by this Court." *Douds*, supra, at 398. Citing *Kovacs v. Cooper*, 336 U.S. 77 (1949) (regulation of blaring sound truck during labor dispute sustained); *Cox v. New Hampshire*, 312 U.S. 569 (1914) (prosecution of unauthorized religious parades sustained).

The analogy between the *Pittsburgh Press* case and the National Labor Relations Board cases supports the position of the Pittsburgh Commission on Human Relations, the National Organization of Women and the *Amici* who have submitted this brief. In this case, as in *Virginia Electric § Power Co. v. NLRB and American Communications Association v. Douds*, there is a neutral economic regulation which modifies the common law employer-employee relationship in order to promote economic prosperity and the welfare of the nation. A minor restriction on First Amendment freedoms is inherent in each regulation. In *Virginia Electric & Power* the restriction is on the right of an employer to state an opinion on a controversial political issue, the right of employees to form unions and bargain collectively; while in *Douds* the restriction is on the right of a union officer to be a member of the Communist Party. In each case, the restriction involves a limitation on the public communication of political ideas. This is the type of communication which formed the theoretical and philosophical basis of the First Amendment. cf.

Meiklejohn, *The Freedom of Expression Is an Absolute*, 1961 Supreme Court Review 245. Thus, this Court has repeatedly sustained minor infringements upon the most fundamental forms of political expression where the purpose of the infringement is to protect the public from a serious evil or promote economic prosperity through regulation of the employer-employee relationship. It follows, *a fortiori*, that the Court must sustain the order of the Pittsburgh Commission on Human Relations and the courts below since they promote economic prosperity and equality of opportunity and only infringe on commercial communication which is much less basic than the political communication in *Douds* and *Virginia Electric & Power Company*.

II. THE FINDING THAT PETITIONER AIDED EMPLOYERS TO ENGAGE IN UNLAWFUL EMPLOYMENT PRACTICES BY ARRANGING HELP-WANTED ADVERTISEMENTS UNDER SEX-DESIGNATED COLUMN HEADINGS IS NOT VIOLATIVE OF DUE PROCESS OF LAW

The Pittsburgh Commission on Human Relations has found that in its employment advertising the Pittsburgh Press was aiding employers to engage in discriminatory employment practices through the use of sex-designated column headings. The Commission concluded, as did the Courts below, *Pittsburgh Press Co. v. The Pittsburgh Commission on Human Relations*, 4 Pa. Commonwealth Ct. 448, 287 A. 2d 161 (1972), that such an arrangement of help-wanted advertising constituted a violation of Section 8(j) of Ordinance No. 75 of February 27, 1967, of the City of Pittsburgh, as amended by Ordinance No. 395, approved July 8, 1969.

Section 8(j) of the Ordinance states that it shall be an unlawful employment practice,

> "(j) For any person . . . to aid, incite, compel, coerce or participate in the doing of any act declared to be an unlawful employment practice by this ordinance, . . ."

The Commission found that the Pittsburgh Press was aiding in the commission of the unlawful employment practice set forth in Section 8(e) of the Ordinances, as follows:

"It shall be an unlawful employment practice . . . except where based upon a bona fide occupational exemption certified by the Commission . . .

(e) For any employer, employment agency or labor organization to publish or circulate, or to cause to be published or circulated, any notice or advertisement relating to employment . . . which indicates any discrimination because of . . . sex."

Discrimination is defined in §4(B) of the ordinances to ". . . include any difference in treatment based on . . . sex."

It is crucial to note that the unlawful employment practice which the Pittsburgh Press was found to have aided was solely that of publishing or causing to be published an employment advertisement which indicated sexual differentation. It is within the police power of lawmaking bodies to enact statutes or ordinances making it unlawful for a newspaper to aid any employer, employment agency or labor organization to publish or cause to be published any advertisement relating to employment which indicates a difference in treatment based on sex. It is clear that the purpose of the ordinance in question was reasonably to promote the economic and social welfare of the people of Pittsburgh. The ordinance clearly prohibits the conduct of the Pittsburgh Press and indeed, has been interpreted by the Pennsylvania Courts to prohibit newspapers from using gender interest column headings in the employment want-ads of newspapers. The decision as to whether or not the use of gender interest headings has a substantial relation-

ship to the existence of a denial of employment opportunity to women, on account of sex, is a basic legislative decision. In *Ferguson v. Skrupa*, 372 U.S. 725 (1963), this Court stated:

> "Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation." At 729.
>
> "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislature bodies, who are elected to pass laws." At 730.
>
> "Legislative bodies have broad scope to experiment with economic problems, and this Court does not sit to 'subject the state to an intolerable supervision hostile to the basic principles of our government and wholly beyond the protection which the general clause of the Fourteenth Amendment was intended to secure.' It is now settled that States 'have power to legislate against what are found to be injurious practices in their internal commercial and business affairs, so long as their laws do not run afoul of some specific federal constitutional prohibition, or of some valid federal law.'" At 730.

Despite Petitioner's assertions to the contrary there is no allegation on the record that the newspaper aided in an employer's refusal to hire an individual because of their sex, an action which would constitute a violation of Section 8(a). Petitioner would

direct our attention away from the very allegation against it and urge that there must be a showing of "... a denial of employment opportunity to women on account of sex" (Brief for Petitioner at 25) to support the "Decision and Order" of the Commission in this matter. This argument misconstrues the nature of the finding that was made by the Commission and upheld by the courts below. The only proof that was necessary to uphold the violation of Section 8(j) here in question was that, (1) an employer caused an employment advertisement to be published that indicated discrimination because of sex, and (2) the Pittsburgh Press aided in the doing of that act. There can be no doubt that there is an abundance of evidence on the record to support a finding that these two elements are present in this case.

In its adjudication the Commission ruled that employers violated Section 8(c) when they placed advertisements in the sex-segregated help-wanted columns of the Pittsburgh Press.

> "An employer by causing an employment advertisement to be placed in either the male interest column or female interest column is, in our judgment, indicating a difference in treatment as to that employment based upon sex, hence engaging in unlawful discrimination" (R. 9a).

This finding was fully supported by testimony and evidence presented to the Commission, and is further buttressed by similar rulings of growing numbers of state civil rights agencies and by the United States

Equal Employment Opportunity Commission. The Pennsylvania Human Relations Commission whose jurisdiction would encompass the present situation, similarly holds that:

> "The placement of an advertisement seeking applicants for employment in a classified advertisement section under 'Help Wanted—Male', or 'Help Wanted—Female Interest' or similar columns with a sex designation is considered to be a violation of §5(b)(2) [Pa. Human Relations Act, Act of July 9, 1969, P. L. 133, 43 P.S. 955] if an employer is covered by the Act and has not received a bona fide occupational qualification exemption from the Commission. The mere fact that the newspaper or magazine publishing such advertisements publishes a disclaimer provision advising that applicants of one sex should assume that applicants of either sex will be considered for employment is not considered by the Commission to be a defense to a complaint alleging a violation of §5(b)." Guidelines on Discrimination Because of Sex, Pa. Bulletin No. 24, Vol. 1, p. 707, Dec. 19, 1970.

In a recent case involving alleged sex discrimination against men, the Court of Appeals for the Fifth Circuit recognized the adverse effect on potential applicants for employment that advertising under sexually designated column headings can have upon equal employment opportunities. As the Court explained in *Hailes v. United Air Lines*, 464 F. 2d 1006, 1009 (5th Cir. 1972):

> ". . . the placing of the ad in the 'Help Wanted—Female' column without a corresponding ad

in the 'Help Wanted—Male' column so plainly indicates a preference for females it cannot be neutralized by the self-conferred title of 'Equal Opportunity Employer'."

Testimony by Robert Seli, Classified Advertising Manager for the Pittsburgh Press, provided additional evidence both that advertisers intended to express a preference for applicants of a particular sex and that the Press was aware of this fact and aided those advertisers to indicate such preferences in their publication (R. 125a-126a):

"Q. As far as employment opportunity ads are concerned, do your ad takers have the discretion to place jobs in any particular column if the advertiser does not express any preference?

A. No, sir, most of the people, who call in have a preference. Let's put it this way. They know where they want the ad to run—automobile or real estate or male interest or female interest. They express this interest where they would like to have this ad placed. In what category. At times, when they do not express a preference, we ask them where they would prefer to have it placed.

Q. If the advertiser clearly expresses a preference for male or female, the Press abides by the preference expressed by the advertiser?

A. Yes, but there is a little difference here. If somebody asks to place a help wanted ad under automobile advertising, we will not accept it. It has to run under help wanted. It's a job offering. It's run under opportunities.

Q. When no preference is expressed by advertisers, you then solicit from the advertiser a response to whether he has a preference?

A. Yes, where they would prefer to have it placed.

Q. In case there is no preference expressed, even after solicitation, who then at the Pittsburgh Press decides which column it goes it?

A. I don't think we have this problem, really.

Q. In each case there is an expression of preference by the advertiser?

A. Yes."

To emphasize this point, Mr. Seli further elaborated as follows (A. 173):

"Q. Is this the only type of—if I may use the word—education for your advertisers? Do you then proceed to tell them of the several categories that should go under this or that, take your choice?

A. We tell them where the majority is—or we try to find out what type of a person they are looking for. Are they looking for a man, or are they looking for a woman? They know this. And *they are interested or more interested in a man or more interested in a woman. They know this, and they state this. This is where they want it.*" (Emphasis supplied.)

This testimony, when viewed in conjunction with the numerous nonexempted employment advertisements placed in the sex-segregated help wanted columns of the Pittsburgh Press (R. 305a-353a), con-

clusively supports a finding that a violation of Section 8(e) of the Pittsburg Ordinance has occurred. By actively aiding those advertisers to express through publication a preference based upon sex, and therefore to violate Section 8(e), the Pittsburgh Press itself has violated Section 8(j).

Petitioner places great weight upon its contention that due process requires a showing that the Pittsburgh Press aided a specific advertiser, and that that advertiser must be charged and found to be in violation of the Ordinance. This position misconstrues the law of aiding and abetting.

In *United States v. Provenzano*, 334 F. 2d 678 (3rd Cir. 1964), cert. denied, 378 U.S. 947, the Court stated that "It is not a prerequisite to the conviction of the aider and abettor that the principal be tried and convicted or in fact even be identified. See *Gray v. United States*, 260 F. 2d 483 (D.C. Cir. 1958)." In discussing the crime of forgery, the Court in *United States v. Dunfur*, 461 F. 2d 662 (10th Cir. 1972), explained that although the person who allegedly uttered the forged check was not charged with any offense, . . . "all that the prosecution need prove in this respect is that the offense has been committed." (citing cases). Further authority for the law of aiding and abetting may be found in *Von Patzoll v. United States*, 163 F. 2d 216 (10th Cir.), cert. denied 332 U.S. 809 (1947); *Meredith v. United States*, 238 F. 2d 535, 542 (4th Cir. 1956); and *United States v. Doughty*, 460 F. 2d 1360 (7th Cir. 1972), and cases cited therein.

As set forth above, numerous violations of Section 8(e) of the Pittsburgh Ordinance, in which Petitioner

has aided, appear in the record and were testified to at the hearing held by the Commission. Although unnecessary in order to establish an aiding and abetting violation of the Ordinance (§8(j)), further and more specific proof of sexually discriminatory employment practices of an advertiser which Petitioner aided in presenting its ad to the public is disclosed in the record. As described by the Commonwealth Court of Pennsylvania, supra, at 4 Pa. Commonwealth Ct. 460:

> "We note here that contrary to the argument of the Pittsburgh Press that the record does not disclose any specific incident of discrimination against any specific woman, a careful reading of the record indicates that one witness did in fact testify to such a result. Her testimony indicated that she responded to an ad placed in the 'Jobs—Male Interest' column for a 'dishwasher' and was advised by an agent of the employer that he had been given specific instructions not to hire a female for the advertised job. The interesting point is that counsel for the Pittsburgh Press, while arguing that this testimony was irrelevant, admitted on the record that this witness may well have had legitimate grounds upon which to file a complaint before the Commission. In view of the fact that the discriminatory practice came about as a result of an ad placed by the employer and was published in an arbitrarily segregated 'male' column, we hold that there was substantial evidence placed in the record to support the charge made by N.O.W."

Although the proceeding before the Commission was not a criminal matter, the evidence presented certainly was sufficient to support a finding of aiding and abetting by the Pittsburgh Press, even if the stricter criminal standards set forth in the cases referred to above are relied upon. Therefore, by any standard or measurement the record clearly establishes a violation of Section 8(j) of the Ordinance by the Press.

Petitioner has attacked the decision of the Commonwealth Court, construing it to hold that the use of gender interest column headings has a real and substantial relationship to the existence of a denial of employment opportunities to women on account of sex. In support of this argument, Petitioner has cited a number of cases that focus upon a statutorily mandated presumption of the ultimate fact upon which guilt is based as flowing naturally from a proven fact, lawful by itself, which the Courts held must be rationally connected to that ultimate conclusion. See *Tot. v. United States*, 319 U.S. 463 (1943), and other cases referred to at page 25 of Petitioner's Brief.

As before, however, the ultimate fact at issue is not whether there was a denial of employment opportunities to women, as prohibited by Section 8(a). Here, the ultimate fact upon which a violation of the Ordinance is founded is Petitioner's aid in the violation of Section 8(e): the publication of a discriminatory employment advertisement. Accordingly, the facts that were *proven* in this case are *themselves* violations of the Ordinance, and we need not proceed

further. These proven facts are *not* facts showing lawful conduct from which a presumption of an ultimate fact showing guilt need be drawn. The latter situation does not exist in this case, and to urge its consideration, as Petitioner has, is only to cloud an otherwise simple issue. As the Commonwealth Court recognized:

> "If the advertising column headings here are discriminatory, they are in violation of the Ordinance per se, and there need not be a specific 'particular' or an actual discrimination suffered by any particular woman. If discriminatory, the column headings were in violation before the first woman actually suffered any act of discrimination" (footnote omitted) (4 Pa. Commonwealth Ct. 460 (1972)).

One final point urged by the Pittsburgh Press deserves mention, if only because it vividly reveals both Petitioner's attitude toward sex discrimination and the reason why litigation was necessary to resolve the issues now before this Honorable Court. By way of explanation of its insistance upon the right to use gender interest headings in employment advertisements, Petitioner states that:

> ". . . the Press believes that the employment patterns in this country *generally* reflect job interest and qualification along sex lines." (Petitioner's Brief at 26.)

Clearly, it is Petitioner's belief in the existence of this state of affairs, and its blatant attempt to justify the immutability of these employment patterns that has given rise to the instant dispute. But to blindly

accept the permanence of this fact, as Petitioner apparently does, is to ignore the basic philosophy and thrust of the fair employment practices Ordinance of the City of Pittsburgh, the Pennsylvania Human Relations Act and Title VII of the United States Civil Rights Act of 1964. Certainly this country's employment patterns generally follow sex lines. That is precisely why the Pittsburgh Ordinance in question has, as its fundamental purpose, the eradication of the discriminatory employment practices that gave rise to this unfortunate situation. Certainly many southern school districts were racially segregated prior to this Court's ruling in *Brown v. Board of Education*, 347 U.S. 483 (1954). But can we say that this pattern of discrimination generally reflected the interest of the Black children who were placed in racially isolated academic surroundings?

Petitioner would have this Court uphold its sexual designation of employment column headings as ". . . a workable classification system [that] arises from the existing de facto division of employment between males and females in numerous different types of work." (Petitioner's Brief at 26-27). But the Supreme Court of Pennsylvania has firmly recognized that all discrimination is itself invidious regardless of its origin and despite the fact that it may have resulted from a de facto state of affairs. See *Pennsylvania Human Relations Commission v. Chester School District*, 427 Pa. 157, 233 A. 2d 290 (1967).

To reach a different conclusion would be tantamount to a condemnation of the concerted efforts of local, state and federal legislative bodies to eliminate

all remaining vestiges of sex discrimination in employment. It is urged that this Court reaffirm its determination that sex discrimination is an evil which must be eradicated. See *Reed v. Reed*, 404 U.S. 71 (1971).

CONCLUSION

For the foregoing reasons, it is respectfully urged that the decision of the Commonwealth Court of Pennsylvania be affirmed.

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